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February 1, 2007

Robin Wesley
Acting General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814-4174

Re: Comments on Proposed Revisions to Agency Fee Regulations
Public Hearing - February 8, 2007

Dear Ms. Wesley:

As you know, I am a staff attorney with the National Right to Work Legal Defense Foundation. The Foundation, established in 1968, is a nonprofit, charitable organization providing free legal aid to employees whose human or civil rights have been violated by abuses of compulsory unionism. Foundation staff attorneys, including myself, have represented, and continue to represent, thousands of California nonunion public employees in federal and state courts, administrative agencies and PERB. During 1988 and 1989, I participated in, and commented on, the formation of the existing agency fee regulations, 8 CCR §§ 32990-32997. I also participated in, and presented written comments before and after, the March 3, 2005 agency fee regulations workshop and the May 16, 2006 meeting on staff revisions to the agency fee regulations. I intend to testify at the February 8, 2007 Board hearing.

At the 2005 workshop and the 2006 staff revisions meeting, I argued, on behalf of the thousands of agency fee payers that I represent who are subject to PERB's existing agency fee regulations, against gutting the regulations as the California Teachers Association and other unions had requested. I presented justification for PERB maintaining its agency fee regulations exactly as they are or with very minor adjustments. Finally, I explained that the existing regulations remain necessary because they give notice to nonmembers, unions and public employers about their respective rights and obligations in an agency shop situation consistent with the *Hudson*[1] rationale and the statutory authorization of agency fees in the public sector.

I am gratified that the proposed regulatory action by the Board in revising Title 8, PERB Agency Fee Regulations, does not fundamentally alter the agency fee regulations as they have existed since 1989. With the reservations discussed below, I basically support the proposed regulation revisions because they maintain the existing agency fee regulations with some adjustments to reflect the current case law of the Ninth Circuit

[1] *Chicago Teaches Union v. Hudson* (1986) 475 U.S. 292.

in this area, and the common practices of unions to distinguish between nonmember objectors and challengers. They also meet all of the legitimate concerns expressed by the unions in their 2005 comments against the current agency fee regulations.

First, as detailed in my previous comments, PERB is not required to follow the Ninth Circuit's ill-advised interpretation of *Hudson* in *Harik v. California Teachers Ass'n* (9th Cir. 2003) 326 F.3d 1042, 1049, that small local affiliates are exempt from *Hudson*'s independent auditor requirement. This is because the regulations must comply with the statutory requirements regarding agency fees, which may grant broader rights than those required by the First Amendment in *Hudson*. Moreover, PERB has not always followed the evolving Ninth Circuit case law in this area and has, in fact, provided agency fee payers with more rights and remedies than arguably the Ninth Circuit says the First Amendment requires. Accordingly, the revision of § 32992(b)[2] to allow "an unaudited financial report if the exclusive representative's annual revenues are less than $50,000 . . . ," should be removed and this subsection returned to its original language. In this way, all unions and their affiliates meet the common audit standards required by *Hudson* and the independent audit is made available to the nonmember.[3] This makes the regulations simpler and less complex to understand and administer.

Second, as explained in my earlier comments, the original exhaustion requirement of § 32994(a)[4] should not have been retained in the proposed revisions because it is contrary to United States Supreme Court precedent. In 1998, nine years after the original exhaustion regulation was issued by PERB, the Supreme Court held that while "*Hudson*'s requirement of 'a reasonably prompt decision by an impartial

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[2]I will refer to the section numbers as stated on the "proposed text" of the revisions to PERB's agency fee regulations, although the proposed deletion of current § 32991 might cause the renumbering of all subsequent sections.

[3]Nothing in Ninth Circuit case law supports deleting the existing requirement that the audit report be made available to the nonmember. *Cummings v. Connell* (9th Cir. 2003) 316 F.3d 886, 891, held that a union's representation in its *Hudson* notice "that the figures had been audited was not sufficient under *Hudson*." Instead, the notice must either include a full copy of the audit or "a certification from the independent auditor that the summarized figures have indeed been audited and have been correctly reproduced from the audited report." *Id.* at 891-92. Accordingly, removing the current language, "an independent audit that shall be made available to the nonmember," is not consistent with current Ninth Circuit case law. At a minimum, the following language should be added to § 32992(b): "The notice will include either a copy of the audited financial report used to calculate the chargeable and nonchargeable expenditures or a certification from the independent auditor that the summarized chargeable and nonchargeable expenditures contained in the notice have indeed been audited and have been correctly reproduced from the audited report."

[4]The exhaustion language in the middle of the proposed revision of § 32994(a) states: "[H]owever, no complaint shall issue until the agency fee challenger has first exhausted the Exclusive Representative's Challenge Procedure."

decisionmaker,' 475 U.S. at 307, aims to protect the interest of objectors by affording them access to a neutral forum in which their objections can be resolved swiftly; **nothing in our decision purports to compel objectors to pursue that remedy**. *See id.* at 307." *Air Line Pilots Ass'n v. Miller* (1998) 523 U.S. 866, 876-77 (emphasis added). The Court further noted: "Indeed, *Hudson*'s emphasis on the need for a speedy remedy **weighs against exhaustion**, even though an arbitration procedure [is] intended to be expeditious, * * *. We resist reading *Hudson* in a manner that might frustrate its very purpose, to advance the swift, fair, and final settlement of objectors' rights." *Id.* at 877 (emphasis added).

Third, the escrow sections of the proposed revisions, §§ 32995(b)(c), do not fully reflect Board decisional law. In *San Ramon Valley Educ. Ass'n, CTA/NEA* (*Abbot and Cameron*) (1990) PERB Decision No. 802, the Board held that *Hudson* requires the escrow account to be independently controlled or managed. *Id.*, slip op. at 30-32, 36. "An [escrow] account that is susceptible to use by the exclusive representative's or affiliate's executive officers, segregated or not, does not provide the necessary protections. * * * Such unrestricted access as was possible here does not sufficiently protect nonmember fee payers' constitutional rights." *Id.* at 31. This requirement is not contained within the proposed revision, which merely requires the union to open an account "in an independent financial institution."[5] Requiring the escrow account to be "in an independent financial institution," does not by itself guarantee that the account is independently controlled or managed. These requirements were recently discussed, although in a different context, in *California Nurses Ass'n* (*O'Malley*) (2003), PERB Decision No. 1578-H, slip op. at 4, where the Board noted that "the union controlled the escrow account" in *Hudson* and "the court held that the union's placement of the funds in an account it controlled, as opposed to an account with a neutral third party trustee, does not render the issue moot." Thus, the proposed revisions of § 32995 should be further revised to state that the escrow account must be independently controlled or managed. Subsections (b) and ©) should now state: ". . ., the exclusive representative shall place in **an independently controlled** escrow **account**, in an independent financial institution, all agency fees collected until . . . ."

For the reasons stated above, I request, on behalf of the nonunion public employees that I represent in California, that the proposed revisions to the agency fee regulations be adopted with the amendments to §§ 32992(b), 32994(a) and 32995(b)(c) that I have noted above.

Sincerely,

Milton L. Chappell
Staff Attorney
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[5]"(b) If agency fees are collected before agency fee objectors are identified, the exclusive representative shall place in escrow, in an independent financial institution, all agency fees collected until . . . .

"(c) If not otherwise escrowed, the exclusive representative shall place in escrow, in an independent financial institution, all agency amounts in dispute until . . . ." § 32995.